(1)

91-1559

Supreme Court, U.S.
FILED
MAR 25 1992
OFFICE OF THE CLERK

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GREGORY J. AVERY AND KATHLEEN R. AVERY,
Petitioners,

versus

JEAN O. TURNER, TRUSTEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

R. PATRICK VANCE *
PIERRE V. MILLER II
JONES, WALKER, WAECHTER,
POITEVENT, CARRERE & DENEGRE
201 ST. CHARLES AVE.
NEW ORLEANS, LA. 70170
TELEPHONE: (504) 582-8000
ATTORNEYS FOR PETITIONERS
* Counsel of Record

QUESTION PRESENTED FOR REVIEW

Whether, in a Chapter 7 bankruptcy liquidation, post-petition payments for the debtor's services rendered both before and after the filing date pursuant to a rejected or a nonassumable pre-petition executory contract belong to the estate, the debtor, or both under the Bankruptcy Code, 11 U.S.C. § 541 and § 365.

TABLE OF CONTENTS

Question Presented for Review i

Table of Authorities iii

Opinion Below 2

Jurisdiction 2

Statutes Involved 2

Statement of the Case 4

Reasons for Granting the Petition 6

I. The Courts Are Divided on the Question Presented 6

II. The Question Presented Is an Important Question of Federal Law Which Should Be Resolved by This Court 14

Conclusion 18

Appendices

A. Court of Appeals Opinion 1

B. District Court Minute Entry 8

C.1. Bankruptcy Court Findings of Fact and Conclusions of Law 17

C.2. Bankruptcy Court Judgment 36

C.3. Bankruptcy Court Amended Judgment . 36

D. Statutes

11 U.S.C. § 541 40

11 U.S.C. § 365 44

TABLE OF AUTHORITIES

FEDERAL CASES

Ford, Bacon & Davis, Inc. v. Holahan, 311 F.2d 901 (5th Cir.), *cert. denied* 373 U.S. 913 (1963) 11

Huston v. United States, 96 F.Supp. 999 (W.D. Penn. 1951) 16

In re Blair, 538 F.2d 849 (9th Cir. 1976) 16

In re Bofill, 25 B.R. 550 (Bkrtcy. S.D.N.Y. 1982 11

In re Brooklyn Overall Co., 57 B.R. 999 (Bkrtcy.E.D.N.Y. 1986) 10

In re Calder, 912 F.2d 454 (10th Cir. 1990) 13

In re Calder, 94 B.R. 200 (Bkrtcy. D. Utah 1988) . . 13

In re Corky Foods Corp., 85 B.R. 903 (Bkrtcy. S.D. Fla. 1988) 8

In re Gravure Paper & Board Corp., 234 F.2d 928 (3rd Cir. 1956) 10

In re Harms, 10 B.R. 817 (Bkrtcy. D. Col. 1981) . . . 8

In re Holland Enter., 25 B.R. 301 (Bkrtcy. E.D. N.C. 1982) 12, 14

In re Lovitt, 757 F.2d 1035 (9th Cir.), *cert. denied sub nom. Cheadle v. Appleatchee Rider's Association*, 474 U.S. 849 (1985) 9, 10

In re Moreggia & Sons, Inc., 852 F.2d 1179 (9th Cir. 1988) 9

In re Noonan, 17 B.R. 793 (Bkrtcy. S.D.N.Y. 1982) 10, 17

In re Norquist, 43 B.R. 224 (Bkrtcy. E.D. Wash. 1984) 7

In re Roberts, 460 F.Supp. 88 (N.D. Ga. 1978) 16

In re Tleel, 876 F.2d 769 (9th Cir. 1989) 9

In re Tonry, 724 F.2d 467 (5th Cir. 1984) 5, 6, 7, 12, 13

Katchen v. Landy, 382 U.S. 323 (1966) 16

McKenzie v. Irving Trust Co., 323 U.S. 365 (1945) 15

NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984) 7, 8, 14

Turner v. Avery, 947 F.2d 772 (5th Cir. 1991) 2, 6, 7, 12, 13

STATUTES

11 U.S.C. § 365 ..... i, 2, 3, 4, 5, 6, 7, 8

11 U.S.C. § 541 ..... i, 2, 3, 4

11 U.S.C. § 542 5

28 U.S.C. § 157 5

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1334 5

LA. CIV. CODE ANN. 2801 (West Supp. 1992) 8

TREATISES

7A C.J.S. *Attorney & Client* §§ 291 and 321(b) (1980) 18

2 COLLIER ON BANKRUPTCY ¶ 365.03 (15th ed. 1992) 7

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GREGORY J. AVERY AND KATHLEEN R. AVERY,
Petitioners,

versus

JEAN O. TURNER, TRUSTEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Gregory J. and Kathleen R. Avery ("Debtors") respectfully submit this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The November 27, 1991 opinion of the United States Court of Appeals for the Fifth Circuit is reported at 947 F.2d 772 (5th Cir. 1991) and is reprinted in Appendix A. The unreported decisions of the United States District Court for the Eastern District of Louisiana and of the United States Bankruptcy Court for the Eastern District of Louisiana are reprinted in Appendices B and C, respectively.

JURISDICTION

The opinion and the judgment of the United States Court of Appeals for the Fifth Circuit were entered on November 27, 1991. On December 26, 1991, the Fifth Circuit denied petitioners' timely petition for rehearing by the panel. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the Bankruptcy Code, 11 U.S.C. § 541 and 11 U.S.C. § 365, which provide, in pertinent part:

11 U.S.C. § 541

(a) The commencement of a case under . . . this title creates an estate. Such estate is compromised of all the following property, wherever located and by whomever held:

(1) . . . all legal or equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. § 365

(a) . . . [T]he trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

. . . .

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor . . ., if--

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or

rendering performance to an entity other than the debtor or the debtor in possession . . .; and

(B) such party does not consent to such assumption or assignment.

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease . . . within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

The full texts of 11 U.S.C. §§ 541 and 365 are set out in Appendix D.

STATEMENT OF THE CASE

Effective May 1, 1985, petitioner Gregory J. Avery, an attorney, and Ray Orrill mutually terminated their law partnership and began practicing as sole practitioners. Because some partnership debts remained, they maintained one partnership bank account for the sole

purpose of paying these debts. They funded this account with 10% of the proceeds received from former partnership contingent fee contracts.

On May 22, 1985, Debtors filed a Voluntary Petition for relief under Chapter 7 of the United States Bankruptcy Code. One and one-half years later, on January 12, 1987, the Trustee, Jean O. Turner, initiated an adversary proceeding under 11 U.S.C. § 542 against Debtors, contending Debtors' interest in the former partnership's contingent fee contracts constituted assets of the bankruptcy estate. The Trustee sought recovery of **all** attorney's fees earned and received by Mr. Avery after Debtors filed their bankruptcy petition. Jurisdiction in the Bankruptcy Court was based on 28 U.S.C. § 1334 and 28 U.S.C. § 157.

Debtors, relying on *In re Tonry*, 724 F.2d 467, 468-69 (5th Cir. 1984), contended the former partnership's contingent fee contracts were nonassumable executory contracts under 11 U.S.C. § 365(c) which cannot belong to the estate. The Bankruptcy Court rejected Debtors' contention and, after trial on the merits, rendered an Amended Judgment in favor of the Trustee. The Bankruptcy Court held the estate was entitled to Debtors' right to share in the residuum of the partnership after liquidation and awarded the Trustee $436,486.77, representing all funds the Debtors' received from the former partnership's contingent fee cases. The District

Court affirmed the Bankruptcy Court's Amended Judgment in all respects.

Debtors timely appealed to the Fifth Circuit. Ruling *Tonry* did apply, the Fifth Circuit held the former partnership's contingent fee contracts were executory contracts which, "as a matter of law . . . **did not form part of the bankruptcy estate.**" *Turner v. Avery*, 947 F.2d 772, 774 (5th Cir. 1991) (emphasis added). Nevertheless, the Fifth Circuit decided, "Only that portion of the contingent fee contract earned prior to the filing of the bankruptcy petition falls into that estate." *Id.* at 773. The Fifth Circuit vacated the judgment of the District Court and remanded the matter to the Bankruptcy Court for further proceedings.

REASONS FOR GRANTING THE WRIT

I. THE COURTS ARE DIVIDED ON THE QUESTION PRESENTED

A trustee, subject to the court's approval, is authorized to assume or reject the debtor's executory contracts. 11 U.S.C. § 365. Allowing the trustee to assume or reject executory contracts enables a trustee to take advantage of contracts that will benefit the estate by assuming them or alternatively, to relieve the estate of

burdensome contracts by rejecting them. *In re Norquist*, 43 B.R. 224, 225 (Bkrtcy. E.D. Wash. 1984).

The decision to assume an executory contract "may have grave consequences for the estate since assumption must be complete and the expenses and liabilities incurred will be expenses of administration." 2 COLLIER ON BANKRUPTCY ¶ 365.03 (15th ed. 1992). As the United States Supreme Court recognized, the assumption of an executory contract is "*cum onere*." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531 (1984).

Not all executory contracts are subject to assumption. "Under § 365 the trustee may not assume an executory contract if, under applicable law, the non-debtor is free to decline performance by the trustee." *In re Tonry*, 724 F.2d 467, 469 (5th Cir. 1984). The Fifth Circuit found the contracts at issue here were personal services contracts nonassumable under 11 U.S.C. § 365(c)(1)(A). *Turner*, 947 F2d at 774.

During a Chapter 7 liquidation, the trustee has only 60 days from the order of relief in which to decide whether to accept or reject an executory contract or such contact is deemed rejected. 11 U.S.C. § 365(d)(1). In the present case, the Trustee failed to assume the contingent

fee contracts.[1] Accordingly, those executory contracts must be deemed rejected. 11 U.S.C. § 365(d)(1). The United States Courts of Appeals are divided on the question of ownership of post-petition payments on such rejected or nonassumable executory contracts.

The United States Court of Appeals for the Ninth Circuit has held that rights under an executory contract which is not timely and affirmatively assumed by the trustee do not become property of debtor's estate. *In re*

---

[1]The Trustee contends the estate is entitled to Debtors' interest in the former partnership, not the contingent fee contracts. But under Louisiana law, a partnership is "created by a contract between two or more persons to combine their efforts or resources in determined proportions and to collaborate at mutual risk for their common profit or commercial benefit." LA. CIV. CODE ANN. art. 2801 (West Supp. 1992). Mr. Avery and Mr. Orrill agreed to contribute their personal skills and efforts as attorneys for their mutual profit or benefit. Debtors' interest, if any, in this partnership was contractual.

An executory contract is one "on which performance remains due to some extent on both sides." *Bildisco*, 465 U.S. at 522 n.6. Because on the filing date performance remained due to some extent on both sides, *i.e.*, both Mr. Orrill and Mr. Avery had obligations to each other and to the clients of the former law partnership to perform legal services, the partnership contract, like the contingent fee contracts, was executory. *In re Corky Foods Corp.*, 85 B.R. 903, 904 (Bkrtcy. S.D. Fla. 1988); *In re Harms*, 10 B.R. 817, 821 (Bkrtcy. D. Col. 1981) (general partner's agreement was executory). Accordingly, accepting the Trustee's contention will not affect this Court's analysis of the question presented.

Tleel, 876 F.2d 769, 770 (9th Cir. 1989); *In re Lovitt*, 757 F.2d 1035, 1041 (9th Cir.), *cert. denied sub nom. Cheadle v. Appleatchee Rider's Association*, 474 U.S. 849 (1985). The Ninth Circuit has explained:

> Because executory contracts and leases involve future liabilities as well as rights, however, an affirmative act of assumption by the trustee is required to bring the property into the estate in order to ensure that the estate is not charged with the liabilities except upon due deliberation. Thus, executory contracts and leases-- unlike all other assets-- do not vest in the trustee as of the date of the filing of the bankruptcy petition. They vest only upon the trustee's timely and affirmative act of assumption.

Lovitt, 757 F.2d at 1041 (citations omitted). *See also In re Moreggia & Sons, Inc.*, 852 F.2d 1179, 1185 (9th Cir. 1988) (observing an affirmative act of assumption is required to bring executory contracts and unexpired leases into the estate to ensure the estate is not unwittingly burdened with liabilities).

Similarly, the United States Court of Appeals for the Third Circuit, in a pre-Bankruptcy Code decision, held the trustee had no "right, title, or interest" in an unexpired lease deemed rejected by the trustee's failure to assume it.

In re Gravure Paper & Board Corp., 234 F.2d 928, 930 and 932 (3rd Cir. 1956). According to the Ninth Circuit, "*Gravure* made clear that once a trustee rejects a lease, he no longer has any right, title or interest in the lease *or its proceeds*." *Lovitt*, 757 F.2d at 1041 (emphasis added).

Although the United States Court of Appeals for the Second Circuit has yet to rule on the issue presented, lower courts within that circuit have held that rejected executory contracts do not form part of the estate. In the oft-cited case of *In re Noonan*, 17 B.R. 793 (Bkrtcy. S.D.N.Y. 1982), the debtor, a songwriter, performer, and recorder, was subject to an exclusive recording contract with Arista Records, Inc. Recognizing the contract was executory, the court held:

> Where an executory contract between the debtor and another is of such a nature as to be based upon the debtor's personal skill, the trustee does not take title to the debtor's rights and cannot deal with the contract. The Arista contract is simply *not the kind of an asset to which the creditors can look* by insisting that the debtor assume it.

Noonan, 17 B.R. at 797-98 (citations omitted and emphasis added). *See also In re Brooklyn Overall Co.*, 57 B.R. 999, 1002 n.2 (Bkrtcy.E.D.N.Y. 1986) ("filing of the petition does divest the estate of those contracts which, pursuant

to § 365(c), cannot be assumed by the trustee"); *In re Bofill*, 25 B.R. 550, 552 (Bkrtcy. S.D.N.Y. 1982) (because the trustee cannot assume an executory personal services contract, the contract *and future profits* from it are excluded from the estate) (emphasis added).

Before passage of the Bankruptcy Code, the Fifth Circuit had recognized, "The general proposition is that the interest of a bankrupt in a contract for personal services, which is executory on the date of the bankruptcy, does not vest in the trustee." *Ford, Bacon & Davis, Inc. v. Holahan*, 311 F.2d 901, 902 (5th Cir.), *cert. denied* 373 U.S. 913 (1963). Explaining the consequences of this rule, the court further stated:

> Since a "personal services" [executory] contract does not vest in the trustee, services performed under it would appear not to be "for the benefit of the estate," but, rather for the personal benefit of the bankrupt.

Ford, Bacon & Davis, 311 F.2d at 904.

Later, after passage of the Bankruptcy Code, the Fifth Circuit confirmed:

> Until the trustee assumes an executory contract, it does not become part of the

> bankruptcy estate. Unlike other assets of the debtor, the interest in an executory contract does not automatically vest in the bankruptcy estate at the time of filing. That status attaches only upon the trustee's assumption of the executory contract.

In re Tonry, 724 F.2d 467, 469 (5th Cir. 1964). The Fifth Circuit then expressly held a debtor attorney's contingent fee contracts are nonassumable executory contracts which do not form a part of the bankruptcy estate if further legal services must be performed by the attorney before the matters may be brought to a conclusion. *Tonry*, 724 F.2d at 468-69.

The trustee in *Tonry* had argued, in the alternative, the value of the debtor's services performed prior to the bankruptcy filing fell into the bankruptcy estate. The Fifth Circuit flatly rejected this argument, explaining:

> Under that [Bankruptcy] Code an executory contract comes into the estate only when assumed by the trustee. The trustee may not assume only a portion, the executory contract must be accepted in its entirety. *See e.g., In re Holland Enter.*, 25 B.R. 301 (D.C.N.C. 1982). The trustee may not assume that portion which yet remains to be

> done. The contingent fee contracts form **no part** of the Tonry bankruptcy estate.

Tonry, 724 F.2d at 469 (emphasis added).

In the present case, the Fifth Circuit followed *Tonry* in recognizing a debtor's nonassumable executory contracts do not fall within the bankruptcy estate. *Turner v. Avery*, 947 F.2d 772, 774 (5th Cir. 1991). Contrary to its holding in *Tonry*, however, the Fifth Circuit has now held that that portion of a nonassumable (and rejected) executory contract earned prior to the bankruptcy filing date falls within the estate. *Turner*, 947 F.2d at 773.

The United States Court of Appeals for the Tenth Circuit has also held post-petition payments from a rejected executory contract may form part of the bankruptcy estate. In *In re Calder*, 912 F.2d 454 (10th Cir. 1990), the Tenth Circuit affirmed the lower courts' decision "for substantially the reasons set forth in the bankruptcy judge's opinion," *Id.* at 455, which stated that "income which is paid post-petition from pre-petition executory contracts should equitably flow to the estate," *In re Calder*, 94 B.R. 200, 203 (Bkrtcy. D. Utah 1988).

II. THE QUESTION PRESENTED IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT.

The question presented requires resolution by this Court for a number of reasons. First, the conflict among the Circuit Courts of Appeals leaves unsettled the question of whether, in a Chapter 7 bankruptcy liquidation, post-petition payments for the debtor's performance of a rejected or a nonassumable pre-petition executory contract belong to the estate, the debtor, or both. A clear resolution of this conflict is important to the multitude of bankruptcy courts, trustees, debtors and potential debtors who must face this issue in Chapter 7 bankruptcies pending or to be filed across the nation.

As noted above, an executory contract or unexpired lease must be assumed *cum onere*. "[A] debtor may not retreat to this provision [section 365], derived from the inherent equitable powers of the bankruptcy courts, to avoid an obligation while it enjoys a benefit which arises in conjunction with that obligation." *In re Holland Enterprises, Inc.*, 25 B.R. 301, 303 (Bkrtcy.E.D.N.C. 1982).

Nevertheless, the jurisprudence of the Fifth and Tenth Circuits, unlike other Circuits which have

considered this issue, allows the trustee to seize the benefits of a nonassumable or a rejected executory contract, even after the debtor completes performance, without bearing the burden of the contract's obligations and liabilities.

This conflict among the Circuits involves a basic issue of bankruptcy law. Resolution of this conflict is essential to the ability of Chapter 7 trustees to evaluate accurately and with some degree of certainty debtors' estates which involve executory contracts. Similarly, unless this conflict is resolved, those considering relief under Chapter 7 will be unable to predict with any reasonable degree of certainty the effect filing for bankruptcy will have on their rights and obligations under pre-petition executory contracts. A Chapter 7 debtor who chooses to complete performance of a pre-petition contract the trustee has rejected or cannot assume runs the risk that the trustee, finding support in the law of the Fifth and Tenth Circuits, may claim the benefits of that performance without the concomitant assumption of the obligations.

Second, the provisions of the Bankruptcy Code are intended to have uniform application throughout the United States. *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 370 (1945). Resolution of this issue will promote the uniform application of the Bankruptcy Code by the various federal courts across the country.

Third, the current jurisprudence of the Fifth and Tenth Circuits frustrates the purposes of the Bankruptcy Code. This Court has recognized that "a chief purpose of the bankruptcy laws is to secure prompt and effectual administration and settlement of the estate of all bankrupts within a limited period." *Katchen v. Landy*, 382 U.S. 323, 328 (1966). As another court observed, "In a bankruptcy proceeding, the object is to liquidate assets of a bankrupt to pay off its creditors as quickly and inexpensively as possible." *Huston v. United States*, 96 F.Supp. 999, 1001 (W.D. Penn. 1951). *See also In re Blair*, 538 F.2d 849, 852 (9th Cir. 1976); *In re Roberts*, 460 F.Supp. 88, 93 (N.D. Ga. 1978).

The Fifth and Tenth Circuit's jurisprudence will require trustees of estates involving contingent fee contracts to evaluate those contracts on a *quantum meruit* basis, measuring the value and worth of legal services performed both before and after the bankruptcy filing. To make this determination, administration of the estate will have to await the conclusion of all of the contingent fee cases.[2] As a practical matter, this may require bankruptcy courts, trustees, debtors, and creditors to wait for years as the wheels of the judiciary slowly creep forward. In the

---

[2]Necessarily, a court cannot apply *quantum meruit* until an absolute determination that moneys are available for distribution. It goes without saying that not all contingent fee contracts result in recovery to the plaintiff.

end, such patience may be rewarded with nothing if the debtor's contingent fee cases end in no recovery at all.

Finally, the Fifth and Tenth Circuit's jurisprudence frustrates a primary purpose of the Bankruptcy Code "to allow the individual debtor to obtain a fresh start, free from creditor harassment and free from the worries and pressures of too much debt." *In re Noonan*, 17 B.R. 793, 800 (Bkrtcy. S.D.N.Y. 1982). "As the full measure of a debtor's fresh start flowing from the bankruptcy process is vital to Congress' mission in enacting the Code, anything which would frustrate the mission must be scrutinized carefully." *Noonan*, 17 B.R. at 800.

Payments on rejected or nonassumable executory contracts will be earned only through the debtor's continued performance of the contracts after filing for bankruptcy. It is the debtor's labors which generate any earnings. Allowing a trustee to step in after the debtor's performance of rejected or nonassumable executory contracts deprives the debtor of a portion of the just rewards for his labors, defeating Congress' primary purpose in enacting the Bankruptcy Code. Such a result is particularly inequitable where, as here, the trustee shares in none of the risk, expense, and labor which produces the benefits. Knowing a portion of the fruits of their time, effort and expenses will be taken away by

trustees, debtors no doubt will choose alternative means to earn their keep, resulting in no payments.[3]

CONCLUSION

This Court should resolve the question presented because the United States Courts of Appeals are divided on this important federal question, resulting in a lack of uniform application of the Bankruptcy Code to executory contracts. Furthermore, the law adopted by the Fifth and Tenth Circuits frustrates Congress' policies of promoting speedy and inexpensive administration and settlement of bankruptcy estates and of securing for the debtor a fresh start.

---

[3]In the context of a contingent fee contract in general, an attorney who withdraws from a case without cause loses his right to a fee, and he may not recover either on the contract or in *quantum meruit*. 7A C.J.S. *Attorney & Client* §§ 291 and 321(b) (1980).

WHEREFORE Petitioners respectfully pray that a writ of certiorari to the United States Court of Appeals for the Fifth Circuit be granted.

Respectfully submitted,

R. PATRICK VANCE *
PIERRE V. MILLER II
Jones, Walker, Waechter,
Poitevent, Carrere & Denegre
201 St. Charles Avenue, 49th Floor
New Orleans, La. 70170
Telephone: (504) 582-8000

* Counsel of Record

APPENDICES

APPENDIX
TABLE OF CONTENTS

APPENDIX A **PAGE**

Jean O. Turner, Trustee vs. Gregory J. Avery and Kathleen R. Avery, United States Court of Appeals for the Fifth Circuit, No. 90-3614, Opinion (November 27, 1991) . . 1

APPENDIX B

Jean O. Turner, Trustee vs. Gregory J. Avery and Kathleen R. Avery, United States District Court for the Eastern District of Louisiana, No. 90-1627, Minute Entry (July 26, 1990) 8

APPENDIX C.1

In re Gregory J. Avery and Kathleen R. Avery, Debtors, No. 85-01168; *Jean O. Turner, Trustee vs. Gregory J. Avery and Kathleen R. Avery*, United States Bankruptcy Court for the Eastern District of Louisiana, No. 87-0005, Findings of Fact and Conclusions of Law (January 29, 1990) . . . 17

APPENDIX C.2 **PAGE**

In re Gregory J. Avery and Kathleen R. Avery, Debtors, No. 85-01168; *Jean O. Turner, Trustee vs. Gregory J. Avery and Kathleen R. Avery*, United States Bankruptcy Court for the Eastern District of Louisiana, No. 87-0005, Judgment (January 29, 1990) 36

APPENDIX C.3

In re Gregory J. Avery and Kathleen R. Avery, Debtors, No. 85-01168; *Jean O. Turner, Trustee vs. Gregory J. Avery and Kathleen R. Avery*, United States Bankruptcy Court for the Eastern District of Louisiana, No. 87-0005, Amended Judgment (March 6, 1990) 38

APPENDIX D

STATUTUES

11 U.S.C. § 541 40

11 U.S.C. § 365 44

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-3614

JEAN O. TURNER, TRUSTEE
Plaintiff-Appellee,

versus

GREGORY J. AVERY and KATHLEEN R. AVERY,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

(November 27, 1991)

Before REAVLEY, POLITZ, and JOLLY, Circuit Judges.

POLITZ, Circuit Judge:

The bankruptcy court, affirmed by the district court, ruled that the fees earned by an attorney-debtor, pursuant

to contingent fee contracts, fell within the bankruptcy estate and, because the debtor failed to prove which portion of the fees were earned prior to the filing of the bankruptcy petition, the entirety of the fees were to be turned over to the trustee. In this the courts *a quo* erred. Contingent fee contracts are nonassumable executory contracts that do not become a part of the bankruptcy estate. Only that portion of the contingent fee contract earned prior to the filing of the bankruptcy petition falls into that estate. Accordingly, we vacate the judgment of the district court and remand this matter to the bankruptcy court for further proceedings consistent herewith.

Background

In 1982 Gregory Avery and Ray Orrill formed a partnership for the practice of law. The partnership continued until May 1, 1985 when it was mutually dissolved. Prior to the termination Avery and Orrill drew up a master list of clients and assigned the cases to the partner who previously had the primary responsibility to and for the particular client. As of May 1, 1985 they began practicing as sole practitioners, each began paying his share of the common overhead expenses, individually advancing all of the expenses on cases received in the division of former partnership matters, and accepting new clients separate and discrete from the old partnership and former partner.

Because some partnership debts remained on the date of dissolution, Avery and Orrill maintained one partnership bank account for the sole purpose of paying these debts as they matured. The account was funded by depositing therein 10% of the proceeds received from former partnership contingent fee cases with the understanding that if any balance existed after all debts were paid it would be divided equally between the two former partners.

On May 22, 1985 Avery and his wife filed a petition under Chapter 7 of the Bankruptcy Code. On the appropriate schedule of their bankruptcy petition they listed their interest in the former law partnership but estimated its value to be zero dollars. Following an investigation the trustee challenged the evaluation and brought an action against Avery seeking to bring into the bankruptcy estate the totality of all fees received from all contingent fee cases completed after the bankruptcy petition was filed.

The bankruptcy court found that the bankruptcy estate was entitled to receive the entirety of Avery's interest in the former partnership which it defined to include the funds received from the contingent fee cases brought to fruition after the bankruptcy filing. After deducting from the sum sought by the trustee several items found not to be income, the bankruptcy court ordered Avery to pay to the trustee the sum of

$436,486.77 plus post-judgment interest. The trustee had unabashedly also sought prejudgment interest which the bankruptcy judge declined to award. Finding that Avery had not adequately proven how much work he had put into the contingent fee cases, the bankruptcy court refused to allow Avery any compensation for his work effort in concluding the cases, by settlement or trial, or any reimbursement for his out-of-pocket expenses. The district court affirmed this ruling and Avery timely appealed.

Analysis

Both the bankruptcy court and the district court ruled that this court's holding in *In re Tonry*, 724 F.2d 467 (5th Cir. 1984), was inapposite. Both courts erred. The sole issue presented by this case is the question of entitlement to fees generated by Avery in the completion of contingent fee contracts which predate his filing in bankruptcy where the securing of the representation and some of the work occurred prior to the filing and some of the work, including closure and distribution of proceeds, occurred after the bankruptcy filing. This issue largely is resolved by our holding in *In re Tonry*.

The issue presented in *Tonry* was whether an attorney's contingent fee contracts formed a part of his bankruptcy estate. We held that a contingent fee contract is an executory contract "if further legal services must be

performed by the attorney before the matter may be brought to a conclusion." *Id.* at 468. Although an executory contract becomes part of the bankruptcy estate when the contract is assumed by the trustee, not all such contracts are subject to assumption. 11 U.S.C. § 365. An executory contract is nonassumable if, under applicable law, any party other than the debtor may decline to accept performance by the trustee. 11 U.S.C. § 365(c)(1)(A). As we noted in *Tonry*, under Louisiana law the clients "may decline performance by [the attorney] at any time and they are not obliged to accept the trustee's attorney as an alternate. Accordingly, the trustee may not assume these executory contingent fee contracts." *Id.* at 469. It is therefore manifest that attorney contingent fee contracts, as such, do not fall into the bankruptcy estate. That conclusion, however, does not end the inquiry posed by the instant case.

The contingent fee contracts in the case at bar were executory because Avery was required to perform services after the bankruptcy petition was filed. Because the contracts were nonassumable as a matter of law they did not form a part of the bankruptcy estate. But it does not follow that the contingent fee contracts had no value to the law partnership as of the date Avery filed for Chapter 7 protection. To the contrary, the contracts on cases subsequently settled or successfully litigated did have a value on that date. That value is determinable on a *quantum merit* basis by measuring the value and worth of

the legal services performed both before and after the bankruptcy filing. This is not a novel inquiry in Louisiana. Very frequently, as a consequence of the dismissal or withdrawal of counsel, or the death or divorce of a married attorney under Louisiana's community property regime, or the voluntary or involuntary dissolution of a partnership, it becomes necessary to place a value on services rendered under a contingent fee contract as of a certain target date. This assessment has proven to be a "doable" both factually and legally. Perhaps the most typical example of a *quantum merit* division of attorney's fees results from the situation where one attorney begins representation which is completed by a second attorney. Fair and equitable divisions routinely are reached. *See In re P & E Boat Rentals, Inc.*, 928 F.2d 662 (5th Cir. 1991); *Saucier v. Hayes Dairy Products, Inc.*, 373 So. 2d 102 (La. 1978); *Fiasconaro & Fiasconaro v. Orlando*, 342 So. 2d 1261 (La. App. 1977).

Of critical importance in the case at bar is the assignment of the burden of proof. The matter at bar qualifies as a turnover action. As the representative of the bankruptcy estate in a turnover action the trustee has the burden of proving the partnership interest which, in this case, translates to the trustee's obligation to prove the value of the legal services provided in each case *prior* to the date of the filing of the bankruptcy petition. *See* 11 U.S.C. § 323; *In re Goodson Steel Corp.*, 488 F.2d 776 (5th

Cir. 1974); *In re S.E. Hornsby & Sons Sand & Gravel Co.*, 57 B.R. 909 (Bankr. M.D.La. 1986).

Conclusion

In summary we hold that the contingent fee contracts at issue, as executory contracts, do not fall into the bankruptcy estate, but that fees earned thereon prior to the date of the filing of the bankruptcy petition do. It is incumbent upon the trustee to establish the value of these services.

The judgment of the district court is VACATED and the matter is REMANDED to the bankruptcy court for further proceedings consistent herewith.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

No. 90-1627

JEAN O. TURNER, TRUSTEE,
Plaintiff-Appellee,

versus

GREGORY J. AVERY and KATHLEEN R. AVERY,
Defendants-Appellants.

Appeal from the United States Bankruptcy Court
for the Eastern District of Louisiana

MINUTE ENTRY
July 26, 1990

Appellants filed this appeal, seeking review of the Bankruptcy Court's order that they turn over to the trustee/appellee proceeds received from an old law partnership, including proceeds generated from contingent fee cases. The trustee cross-appeals regarding the

Bankruptcy Court's ruling that interest runs from the date of judgment rather than the date of judicial demand.

I. FACTS

Appellant Gregory Avery formed a law partnership with Ray Orrill in 1982. They agreed to terminate the partnership effective on May 1, 1985. Prior to this date, the partners prepared a master list of clients and split up the files between themselves. On May 1, 1985, they started practicing law separately, each taking new clients, and paying his own expenses.

Avery and Orrill did not pay all partnership debts as of May 1, 1985. They kept open one partnership account for the purpose of paying lingering partnership debts. They also agreed that when a contingent fee was recovered on a former partnership case, ten percent of the fee would be placed in this account to pay partnership debts. They split the rest of those fees evenly.

On May 22, 1985, appellants filed for bankruptcy under Chapter 7, listing the former partnership as an asset, but declaring its value as zero. The trustee investigated the value of the partnership and filed suit, alleging that Avery should turn over to the bankruptcy estate proceeds paid to him from partnership contingent fee cases that were concluded after he filed for bankruptcy. After a trial, the Bankruptcy Court ruled that

the bankruptcy estate was entitled to Avery's interest in the former partnership, including the funds he received from the partnership cases on a contingent basis. After granting several exclusions from trustee's evidence (*sic*) regarding the sum of those proceeds, the court ordered appellants to pay $436,486.77 to the trustee.

II. CONTENTIONS

A. Appellants contend that the partnership ceased to exist as of May 1, 1985, three weeks before they filed for bankruptcy. Because it had previously ceased to exist, appellants contend that the partnership could not own assets when their bankruptcy petition was filed. Instead, appellants argue that the old partnership cases belonged to the individual former partners as of the date appellants' bankruptcy petition was filed. In addition, appellants contend that the contingent fee contracts were executory, and thus, could not be, and were not, assumed by the trustee, regardless of who owned them at the time they filed for bankruptcy. Thus, appellants conclude the proceeds from those contracts cannot flow into the bankruptcy estate.

In the alternative, appellants contend that the trustee did not carry her burden of proving with certainty the sum of proceeds Avery received from old partnership cases, and that the Bankruptcy Court erred in not offsetting the amount appellants were ordered to turn over to the estate

by an amount that would fairly compensate Avery for his work on those old partnership cases.

B. The trustee contends that the Bankruptcy Court correctly concluded that the partnership did not cease to exist as of May 1, 1985 since it was not liquidated as of that date. Accordingly, it had assets after appellants filed for bankruptcy according to the trustee, including the contingent fee cases.

Further, the trustee contends that it did meet its burden of proving the amount of funds earned by Avery on old partnership cases, and that the Bankruptcy Court did not err by failing to offset the amount Avery was ordered to turn over to the estate since Avery failed to produce any records to substantiate the quantity of time he spent on old partnership cases.

III. STANDARD OF REVIEW

This court reviews the bankruptcy court's findings of fact under the clearly erroneous standard, but its conclusions of law are subject to *de novo* review. *In re Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1252 (5th Cir. 1986).

IV. ANALYSIS

1. *The Bankruptcy Court did not err in concluding that proceeds from the former partnership's contingency fee contracts formed a portion of the bankruptcy estate.*

The existence and scope of a debtor's interest in a given asset is resolved according to state law. *In re Framers Markets, Inc.*, 752 F.2d 1400, 1402 (9th Cir. 1986). Louisiana Civil Code Article 2826 states that a partnership may be terminated upon unanimous consent of the partners. However, a partnership maintains a fictional identity for liquidation purposes after it has been terminated. La. Civ. Code arts. 2828, 2834; *Edco Properties v. Landry*, 371 So. 2d 1367, 1371 (La. App. 3d Cir. 1979), *writ denied*, 375 So. 2d 945 (1979). Further, liquidation of a partnership is not final until all the assets have been collected and applied to its obligations and the remainder distributed to the partners. *Id.* at art. 2835.

In this case, the partnership was terminated on May 1, 1985. The bankruptcy judge correctly concluded that the partnership did not cease to exist on that date of termination, and thus, owned the contingent fee cases after appellants filed for bankruptcy. The bankruptcy judge also correctly rejected appellants' argument that, regardless of when the partnership was terminated, the contingent fee contracts were executory, and thus, could not flow into the estate without being assumed by the

trustee. *See Matter of Tony* (*sic*), 724 F. 2d 467, 469 (5th Cir. 1984). Until the trustee assumes an executory contract, it does not become part of the bankruptcy estate. *Id.* However, the bankruptcy judge noted that Avery assumed these contracts himself, and reasoned that they must have been of value to the partnership since "if the non-debtor under the contracts had withdrawn from [them], Avery would have been able to recover for his time on a quasi-contract or quantum meruit basis." *In re: Gregory J. and Kathleen Avery*, Findings of Fact and Conclusions of Law ("Opinion"), p. 12. The bankruptcy judge concluded that since the contracts in question were fully performed, the benefits incident to them equitably flow into the bankruptcy estate. *Cf. In re Cooley*, 87 B.R. 432, 444 (Bankr. S.D. Tex. 1988) (In Chapter 11 case, income paid post-petition from pre-petition executory contracts equitably flow into the bankruptcy estate). This court, upon *de novo* review of this conclusion, agrees.

2. *No clearly erroneous error was committed in finding the amount paid to Avery from old partnership cases.*

The issue of how much Avery was paid for old partnership cases is largely an issue of fact, and therefore, the bankruptcy judge's findings regarding that issue will not be disturbed unless they are found to be clearly erroneous. The trustee at trial produced a voluminous bench book documenting the partnership cases. The parties stipulated to its authenticity. However, Avery

attacks the trustee's method of computing the proceeds he received from those cases. Most pointed is Avery's contention that several elements of the proceeds that Avery testified were not income were included in the sum he must now turn over to the estate. The bankruptcy judge considered these contentions, and certain exclusions requested by Avery were made. This court finds no clearly erroneous error regarding the determination of how much Avery was paid from old partnership cases.

3. *The Bankruptcy Court did not err in refusing to offset the amount of proceeds due to the estate from Avery to compensate him for his time spent on those cases since his evidence documenting his time spent was extremely scant.*

Since Avery spent time working on the old partnership cases from which the proceeds derived that now flow into the estate, he should be compensated for the time spent on those cases. Avery rightfully had the burden at trial to prove how much time he spent, and what that compensation should be. *Fowler v. Jordan*, 430 So. 2d 711, 715-16 (La. App. 2d Cir. 1983). Louisiana law requires that an attorney is only entitled to compensation for services *actually* performed on the basis of quantum meruit. *Fiasconaro & Fiasconaro v. Orlando*, 342 So. 2d 1261, 1263 (La. App. 4th Cir. 1977). In addition, a twelve point test applies to requests for reasonable attorneys fees. *See Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714 (5th Cir. 1974).

Avery made no effort at trial to document the amount of time he spent on these old cases. The fact that he was working on contingency cases and did not keep records for that reason is understandable. However, he received the trustee's bench book documenting each partnership case well in advance of trial. Avery's argument that the resources were not available to make some effort at documenting the time he spent on those cases is unpersuasive. The bankruptcy judge was asked to award an offset based on multiple assumptions, which he rightfully refused to do.

4. *The Bankruptcy Court correctly set interest to run from the date o judgment, not judicial demand.*

The trustee cross-appealed regarding the bankruptcy judge's denial of their contention that interest should run from the date of judicial demand. In the absence of a statutory provision, the award of pre-judgment interest is in the discretion of the court. *Oil, Chemical and Atomic Workers Intern. Union, Local 4-447 v. American Cyanamid Co.*, 546 F.2d 1144 (5th Cir. 1977). The bankruptcy judge did not abuse his discretion in refusing to award pre-judgment interest, especially considering that Avery, after failing to prove the amount of time he spent generating the money he now turns over to the estate, must turn over all of those proceeds.

The Bankruptcy Court is AFFIRMED in all respects.

s/ Peter Beer

APPENDIX C.1

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

No. 85-01168

In re GREGORY J. AVERY AND KATHLEEN R. AVERY,

Debtors.

Adversary No. 87-0005
JEAN O. TURNER,

Plaintiff,

versus

GREGORY J. AVERY AND KATHLEEN R. AVERY,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court on a Complaint for Turnover of Value of Partnership filed on May 2, 1988 by Jean Hebert Turner, Trustee. The Trustee asserts that the bankruptcy estate includes the Debtors' interest in

Avery's former law partnerhsip, known as Orrill and Avery. The Debtors' Answer admits the existence of the partnership, but denies that the partnership is one of the assets of the estate, and prays that the Complaint be dismissed for failure to state a claim. In support of its motion to dismiss, the Debtor asserts that the Trustee's Complaint should be dismissed because the law partnership did not exist on the day of the filing of the Chapter 7 petition. In addition, the Debtors assert that the case of *Matter of Tonry*, 724 F.2d 467 (5th Cir. 1984) prohibits the Trustee from assuming the Debtor's contingency fee contracts.

On April 6, 1988, this Court denied the Debtors' Motion to Dismiss, stating that the *Tonry* decision is not dispositive, since the Trustee is not seeking to assume the Debtor's contingency fee contracts, but seeks instead to receive the Debtor's interest in the assets of the former law partnership at the date of filing as property of the estate. Debtor's appeal of the denial of the Motion to Dismiss was dismissed with prejudice for failure to prosecute on October 26, 1989. A trial was held on the matter on June 5, 1989 and August 18, 1989, at which time the Court heard testimony from witnesses and statements of counsel. After considering the evidence offered, both testimonial and documentary, and reviewing the record in the case as well as the applicable law, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1.

In 1982, Ray Orrill (Orrill) and Gregory J. Avery (Avery) orally agreed to establish a partnership for the practice of law. Thereafter, the individual partners operated as a true partnership, borrowing money and establishing bank accounts in the partnership name.

2.

The Orrill and Avery partnership was engaged in the handling of negligence and medical malpractice cases on a contingency fee basis.

3.

Orrill and Avery orally agreed to terminate the partnership as of May 1, 1985.

4.

At trial, Orrill testified that, by consensual agreement, a master list of cases was prepared as of April 30, 1985. After the termination of the partnership, each attorney with primary responsibility for a case was to continue to manage the case to conclusion and all expenses were to be funded by the attorney assigned the case. Each attorney

opened an individual bank account; however, one partnership account remained open to pay off the partnership debts. Upon completion of a partnership case, the parties agreed that the responsible attorney would place funds received in his individual escrow account and make an accounting to the other attorney by way of a case disbursement report. Ten percent of the fee would be placed in the partnership account to pay for partnership debts and any costs advanced by the partnership would also be placed in the account. Costs advanced by the attorney would be paid directly to the attorney; the balance of the fee would be split evenly.

5.

Orrill also testified that after May, 1985, the parties agreed to place all accounts receivable collected for work completed through April 30, 1985 in a partnership account to liquidate the partnership debts.

6.

After May 1, 1989, partnership cases were handled in the same manner as they were prior to the termination, except that each attorney was not responsible for support of this (*sic*) own staff and all new cases received a new designation.

7.

On May 22, 1985, the Debtors filed a Voluntary Petition under Chapter 7 of the Bankruptcy Code. The Debtors listed in Schedule B-2, subparagraph "u," their interest in the Orrill and Avery law partnership.

8.

On April 3, 1986, Orrill and Avery executed a Memorandum of Understanding which transferred partnership cases to the attorney assigned the case, with the exception of certain enumerated cases. After the transfer, the parties would not account to the other attorney for fees or recovered costs on the transferred case.

9.

The partnership account remained open at the Whitney National Bank until June, 1986, when all partnership debts were paid. At that time, the residual balance left in the account was split between the parties.

10.

Avery continued to recover fees and costs from partnership cases handled by himself and from cases handled by Orrill from the period between May 1, 1985

through the end of 1986. In 1987, the Debtor recovered fees and costs only from partnership cases handled by himself.

CONCLUSIONS OF LAW

1.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157 and 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2.

> 11 U.S.C. § 541(a) provides in pertinent part:
> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

> (2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is (A) under the sole, equal, or joint management and control of the debtor; or (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

3.

Under 11 U.S.C. § 541(a), the definition of "property" is intended to be broad, *In re Goff*, 706 F.2d 574 (5th Cir. 1983), and the estate's property includes all the property in which the debtor has an interest on the date of the commencement of the bankruptcy case, by whomever held and wherever such property is located, including equitable as well as legal interests. *In re Kaiser*, 722 F.2d 1574 (2d Cir. 1983). The Code provision is intended to bring into the estate "anything of value the debtor ha[s]." *See* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 368 (1977). Under Section 70(a) of the Bankruptcy Act, the court was required to determine whether an asset was included within an estate based upon an analysis of whether the property "is sufficiently rooted in pre-bankruptcy past and

so little entangled with the bankrupts' ability to make an unencumbered fresh start . . . it should be regarded as 'property.'" *Segal v. Rochelle*, 382 U.S. 375, 380, 86 S.Ct. 511, 515, 15 L.Ed.2d 428 (1966). The Fifth Circuit specifically stated that the enactment of the Bankruptcy Code obviated the need to undertake such an "analytical conundrum"; therefore, property of the estate includes all property in which a debtor has a "legal or equitable interest" at the time of bankruptcy. *In re Goff*, 706 F.2d 574, 578 (5th Cir. 1983). The Debtors listed on their schedule the interest in the law partnership. The partnership forms an asset in which Debtors may have a legal or equitable interest. Accordingly, the bankruptcy estate in this case is the legal owner of all assets listed int he Debtors' schedules, inciuding the Debtors' interest in the law partnership, at the time of the filing of the bankruptcy petition.

4.

While 11 U.S.C. § 541(a) defines what interests may become property of the estate, nonbankruptcy law defines the scope and existence of that interest. *In re Farmers Markets, Inc.*, 792 F.2d 1400 (9th Cir. 1986). In this case, Louisiana law determines the scope and existence of the Debtors' interest in the law partnership.

5.

La. Civil Code Art. 2826 governs the termination of a partnership. Art. 2826 states that a partnership may be terminated by the unanimous consent of its partners. In this case, the law partnership was terminated as of May 1, 1985, when the partners agreed to the termination. However, La. Civil Code Art. 2829 provides for the continuation of the partnership for liquidation purposes. Under article 2829, the partnership maintains a fictional identity for liquidation purposes. The fictional identity exists until the former partnership's affairs are wound up and completed. *See Werner v. Illinois Central Gulf R.R.*, 578 F. Supp. 384 (E.D.La. 1984); *Cambre v. St. Paul Fire & Marine Co.*, 331 So. 2d 585 (La. App. 1st Cir. 1976); *Duvic v. Home Fin. Serv*, 23 So. 2d 790 (La. App. Orleans 1945) (termination of partnership does not extinguish concern as a legal entity until affairs of liquidation are complete). The dissolved partnership maintains a fictional existence until all its affairs are completed; as such the partnership is permitted to liquidate its affairs, perform existing contracts, collects its debts, pay its obligations and distribute its assets. *Edco Properties v. Landry*, 371 So. 2d 1367, *writ denied*, 375 So. 2d 945 (La. App. 1979).

6.

Louisiana Civil Code Article 2832 specifies that creditors of the partnership have preference to be paid

from partnership assets, while Article 2833 states the order of priority in the division of the partnership assets. Article 2835 states that the liquidation of a partnership is not final until all the partnership assets have been collected and applied to its obligations and the remainder distributed to the partners. In this case, the partners orally agreed to continue handling all partnership cases after termination in the same manner as they were handled prior to termination. With the closing of each partnership case, the former partnership partially liquidated the assets belonging to the terminated partnership.

7.

The record reflects that the bulk of the partnership debts were liquidated by April 3, 1986. On June 12, 1986, the partnership account was closed and each attorney received $1,217.12 of the residual. While the partnership debts were paid, the remaining partnership assets, including contingent fee cases, remained to be liquidated.

8.

Louisiana law is very clear that a partnership is a separate legal entity which is distinct from the persons which comprise the partnership. *See LaCoste v. C and C Contractors*, 328 So. 2d 802 (La. App. 1976). Under the civil law system, once a partnership is formed, it possesses a distinct and separate legal relationship; by a fiction of

law, the partnership is recognized as the owner of partnership property, and the partners are recognized as only the owners of the residuum which may be left from the partnership property after the partnership obligations have been discharged. *Trappey v. Lumbermen's Mut. Cas. Co.*, 86 So. 2d 515, 229 La. 632 (La. 1956); *Wolf v. Whitney*, 424 S.2d 300 (La. App. 1st Cir.), writ denied 428 So. 2d 807 (La. 1982).

9.

As each of the former partnership cases was liquidated, the resulting fees belonged to the partnership as a partnership asset. Once all partnership obligations were paid, the partners owned their share of the residuum of the partnership. This share of the residuum of the liquidated partnership received by Avery represented his share of the partnership property.

10.

Under federal bankruptcy law, it is clear that, while the term "property of the estate" does not encompass specific assets of a partnership where the debtor/partner owns an interest, *see In re Pentell*, 777 F.2d 1281 (7th Cir. 1985); *In re Minton Group, Inc.*, 27 B.R. 385 (S.D.N.Y. 1985), the debtor's interest in a partnership constitutes "property" of the bankruptcy estate. *Accord In re Imperial "400" National, Inc.*, 429 F.2d 671 (3d Cir. 1970) (decided

under § 70a(5) of the Bankruptcy Act). Under 11 U.S.C. § 541(d) the property interest that passes to the estate is no greater than the interest held by the debtor when the petition was filed. Under Louisiana law, at the time of the filing of the bankruptcy petition, the debtor owned the right to his share of the residuum upon the liquidation of the partnership. Accordingly, the bankruptcy estate is the owner of the funds received by the Debtors' upon the liquidation of the former partnership cases, which represented assets of the partnership.

11.

Debtors assert that *In re Tonry*, 724 F.2d 467 (5th Cir. 1984) prevents the contingent fee cases, which formerly belonged to the partnership, from entering the estate. Debtors argue that the partnership was dissolved prior to the filing of the bankruptcy petition; therefore, Avery's clients, after the filing date, had a legal relationship with him as a sole legal practitioner, and not as a partnership. Debtors argue that, since the clients had an attorney-client relationship with Avery, *Tonry* prevents the trustee from assuming the executory contingent fee contracts.

The Court found that *Tonry* is inapplicable under the facts of this case. It is clear that the partnership, although terminated, was not liquidated as of the date of the filing of the bankruptcy petition. The former partners did not follow the format established in the articles of the Civil

Code when liquidating the partnership; instead, they devised their own system. Since the partnership debts were not paid prior to the filing of the petition, nor assumed by the partners individually in proportion to their respective interest, the partnership was not liquidated. Since the partnership was not liquidated, assets could not be distributed to the partners. These assets include the contingent fees cases, which remained the property of the fictional juridical personality of the terminated partnership. *Werner v. Illinois Central Gulf Railroad*, 578 F. Supp. 384 (E.D.La. 1984). As such, the clients involved in the contingent fee cases were not clients of the Debtor as a sole practitioner, but remained clients under cases belonging to the unliquidated partnership. The bench book presented at trial indicates that Avery has received monies representative of his partnership share of the former partnership in the amount of $456,442.95. These funds are assets of the former partnership, which constitute property of the bankruptcy estate.

12.

Debtors assert that the trustee has not attempted to assume the contingency fee contracts, and that the trustee has thereby rejected the contracts. In a Chapter 7 case, executory contracts are automatically rejected under 11 U.S.C. § 365(d)(1). The question before the court is the disposition of the unassumed contracts. While it is clear that an unassumed executory contract cannot be enforced

against a debtor or debtor-in-possession, *see NLRB v. Bildisco*, 465 U.S. 513 (1984), it is not so clear whether they may nevertheless be enforced by the debtor or debtor-in-possession. *See* Hon. H. C. Buschman III, *Benefits and Burdens: Post-Petition Performance of Unassumed Executory Contracts*, 5 Bankr. Dev. J. 341 (1988). At least one court has held that a non-debtor who has terminated a non-assumable executory contract is in violation of the automatic stay. *Computer Communications, Inc. v. Codex Corp. (In re Computer Communications, Inc.)*, 824 F.2d 725 (9th Cir. 1987). At trial, the trustee stated that she did not assume the contracts, nor did she appoint Avery as administrator. Instead, Avery took it upon himself to enforce the nonassumable executory contracts. Obviously, the contracts had a value to the partnership, since if the non-debtor under the contracts had withdrawn from the contract, Avery would be able to recover for his time on a quasi-contract or quantum meruit basis. Since the contracts in question were fully performed, the benefits incident to the contracts equitably flow into the bankruptcy estate and became estate property. *Cf. In re Cooley*, 87 B.R. 432 (Bankr. S.D. Tex. 1988) (In Chapter 11 case, income paid post-petition from pre-petition executory contracts equitably flow into the bankruptcy estate).

13.

Avery also contends that he is entitled to an offset for all expenses paid, including but not limited to office expenses, client expenses, reasonable and necessary expenses and a quantum meruit claim for attorney's fees for the time, effort and skill employed by him to bring the partnerhsip cases to fruitation (*sic*), for income taxes paid by Debtors and for ordinary and necessary expenses that were paid in connection with the operation of the partnership. The Debtor has the burden of proving his quantum meruit claim. *Fowler v. Jordan*, 430 So. 2d 711, 715-16 (La. App. 2d Cir. 1983) states:

> However, the attorney who has been discharged and is seeking to recover on a quantum meruit basis assumes the burden of proving the value of his services, and the extent of his expenses. *Simon v. Metoyer, supra*; *Chiasson v. Law Firm of Dragon & Kellner, supra*; *Smith v. Westside Transit, supra*; *Kramer v. Graham, supra*. Recovery is limited to the actual value of the service rendered. *Chiasson, supra*; *Saucier v. Hayes Dairy Products, supra*.

14.

The record in this case presents no evidence as the (*sic*) actual value of the services rendered. Louisiana case

law specifies that the attorney is only entitled to compensation for services actually performed on the basis of quantum meruit. *Fiasconaro and Fiasconaro v. Orlando*, 342 So. 2d 1261 (La. App. 1977); *Woodley v. Robinson*, 100 So. 2d 255 (La. App. 1958). Avery did not keep time records on the cases for which he received a fee and, even though apprised of the fact that Court would be considering his motion for offset, did not attempt prior to trial to reconstruct for the court the time involved or the labor performed in any of the case (*sic*) he handled individually. Therefore, Avery has failed in his burden to prove the actual value of the services rendered, or even to show the time he invested in any given case, and the Court must deny a claim for quantum meruit.

15.

Moreover, the Court must deny any claim for attorney's fees that Avery may be demanding for work done on partnership cases under the theory that he was employed as the successor attorney of the case. The Court must consider twelve areas when deciding reasonable attorney fees. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *In re Evangeline Refining Co.*, No. 8-4661, slip. op. at 14 (5th Cir. December 11, 1989). The first area concerns the time and labor required; however, Avery stated at trial that he kept no time records in any of the partnership cases and that he did not attempt, prior to trial, to reconstruct for the

court the time involved or the labor performed in any of the cases he handled individually. No judgment can be made as to other factors, specifically the novelty and difficulty of the questions involved, preclusion of other employment, time limitations imposed by the client, or the nature and length of professional relationship with the client, since only a minimal amount of information was provided to the trustee concerning each partnership case.

Mr. Avery asks the Court to accept a computation of his fee based upon a formula which asks the Court to assume that he worked 30 hours per week at a specified rate and to multiply that figure by a percentage representing the ratio of partnership income received in a given year to total income received. However, Mr. Avery's calculation fails to take into consideration that income received in any given year may have been earned prior to filing. Mr. Avery testified at trial that the figure was not based upon any time records or any log indicating the time he actually worked in any given week. The applicant bears the burden of proof in a fee application case. *See Matter of U.S. Golf Corp.*, 639 F.2d 1197, 1207 (5th Cir. 1981). Additionally, since every dollar received by the applicant would effectively reduce the amount available for creditors, justification for compensation is necessary. *In re Hotel Assoc.*, 15 B.R. 487, 488 (Bankr. E.D.Pa. 1981). The Fifth Circuit Court of Appeals, in a case involving a request for trustee's and attorney

compensation for administering a bankruptcy estate has recently stated:

> While a lack of contemporaneous record keeping does not per se result in a denial of fees, where reconstructed records become a mere guess by the applicant, it is difficult, if not impossible for a reviewing court to make an independent evaluation as to what fees are actual, necessary and reasonable based upon a record sufficiently detailed and accurate to support that evaluation. The harsh sanction of total denial of compensation is a rare one. However, a court should only award fees to the level that has been proven to be actual, necessary and reasonable. Any lesser requirement would make the applicant's burden of proof a mere shell.

In re Evangeline Refining Co., No. 8-4661, slip. op. at 39 (5th Cir. December 11, 1989). For the foregoing reasons, the Court cannot accept such a speculative amount in justification of a fee award.

16.

The Court finds that the bankruptcy estate is entitled to Avery's interest in his former partnership, including the funds received from the partnership cases, without the deduction of an offset for attorney fees or quantum

meruit. The parties have stipulated to the authenticity of the bench book used at trial, and the court accepts the summary and tabulation of plaintiff's Exhibit 9a, in the amount of $456,442.95, as correct. Defendants' Exhibit 5 lists four exclusions to the benchbook prayed for by Mr. Avery. Exclusion I is for cases that belong solely to Mr. Avery and not by the former partnership. The Court finds that cases N-G-101 and M-R-10 are not partnership cases, and therefore allows an exclusion of $17,956.18. All exclusions prayed for in Exclusion II and III are denied. Exclusion IV is permitted as the check Y-1, number 102 in the amount of $2,000. Accordingly, the Debtors are ordered to pay to the trustee the sum of $436,486.77

New Orleans, Louisiana, January 29, 1990.

s/ T.M. Brahney, III
T.M. Brahney, III
U.S. Bankruptcy Judge

APPENDIX C.2

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

No. 85-01168

In re GREGORY J. AVERY AND
KATHLEEN R. AVERY,

Debtors.

Adversary No. 87-0005
JEAN O. TURNER,

Plaintiff,

versus

GREGORY J. AVERY AND
KATHLEEN R. AVERY,

Defendants.

JUDGMENT

This matter came before the Court on a Complaint for Turnover of Value of Partnership filed on May 2, 1988 by Jean Hebert Turner, Trustee. Considering the arguments of counsel, the testimony of witnesses, and the

evidence adduced, and in accordance with the foregoing Findings of Fact and Conclusions of Law,

IT IS ORDERED, ADJUDGED, AND DECREED that the Complaint of Jean Hebert Turner, Trustee to turnover the value of Debtors' law partnership be, and it is hereby, GRANTED and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the value of said partnership, less a deduction for exclusions, is determined to be $436,486.77, which funds are to be turned over to the Trustee, Jean O. Turner.

New Orleans, Louisiana, January 29, 1990.

s/ T.M. Brahney, III
T.M. Brahney, III
U.S. Bankruptcy Judge

APPENDIX C.3

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

No. 85-01168

In re GREGORY J. AVERY AND
KATHLEEN R. AVERY,

Debtors.

Adversary No. 87-0005
JEAN O. TURNER,

Plaintiff,

versus

GREGORY J. AVERY AND
KATHLEEN R. AVERY,

Defendants.

AMENDED JUDGMENT

This matter came before the Court on a Complaint for Turnover of Value of Partnership filed on May 2, 1988 by Jean Hebert Turner, Trustee. Considering the arguments of counsel, the testimony of witnesses, and the

evidence adduced, and in accordance with the foregoing Findings of Fact and Conclusions of Law,

IT IS ORDERED, ADJUDGED, AND DECREED that the Complaint of Jean Hebert Turner, Trustee to turnover the value of Debtors' law partnership be, and it is hereby, GRANTED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the value of said partnership, less a deduction for exclusions, is determined to be $436,486.77.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the post-judgment interest shall accrue upon the amount awarded from the date of the judgment, January 29, 1990 until paid, at an interest rate equal to the average yield on 52-week U.S. Treasury bills settled immediately prior to judgment, specified to be 7.74%.

New Orleans, Louisiana, this 6th day of March, 1990.

s/ T.M. Brahney, III
T.M. Brahney, III
U.S. Bankruptcy Judge

APPENDIX D

STATUTES

§ 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that debtor acquires or becomes entitled to acquire within 180 days after such date--

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include--

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case; or

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an education institution.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement,

transfer instrument, or applicable nonbankruptcy law--

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of

any equitable interest in such property that the debtor does not hold.

11 U.S.C. § 365. Executory contracts and unexpired leases.

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee--

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to--

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(3) For the purpose of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance--

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment or rights or delegation of duties, if--

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession whether or not such contract, or lease, prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has bene terminated under applicable nonbankruptcy law prior to the order for relief.

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the

debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on--

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease

prohibits or restricts assignment of rights or delegation of duties, if--

(A)(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)(1) Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if--

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease--

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title--

(A) if before such rejection the case has not been converted under section 1112, 1307, or 1208 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1307, or 1208 of this title--

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)(1) If the trustee rejects an unexpired lease of real property of the debtor under which the debtor is the lessor, or a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller, the lessee or timeshare interest purchaser under such lease or timeshare plan may treat such lease or timeshare plan as terminated by such rejection, where the disaffirmance by the trustee amounts to such a breach as would entitle the lessee or timeshare interest purchaser to treat such lease or timeshare

plan as terminated by virtue of its own terms, applicable nonbankruptcy law, or other agreements the lessee or timeshare interest purchaser has made with other parties; or, in the alternative, the lessee or timeshare interest purchaser may remain in possession of the leasehold or timeshare interest under any lease or timeshare plan the term of which has commenced for the balance of such term and for any renewal or extension of such term that is enforceable by such lessee or timeshare interest purchaser under applicable nonbankruptcy law.

(2) If such lessee or timeshare interest purchaser remains in possession as provided in paragraph (1) of this subsection, such lessee or timeshare interest purchaser may offset against the rent reserved under such lease or moneys due for such timeshare interest for the balance of the term after the date of the rejection of such lease or timeshare interest, and any such renewal or extension thereof, any damages occurring after such date caused by the nonperformance of any obligation of the debtor under such lease or timeshare plan after such date, but such lessee or timeshare interest purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a

timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession--

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the

purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect--

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable

nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for--

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract--

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period

described in paragraph (l)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive-

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall--

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain

such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall--

(A) to the extent provided in such contract or any agreement supplementary to such contract--

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any

deficit under, any commitment by the debtor to the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Director of the Office of Thrift Supervision, the Comptroller of the Currency, or the Board of Governors of the Federal Reserve System, or its predecessors or successors, to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

Supreme Court, U.S.
FILED
APR 27 1992
OFFICE OF THE CLERK

No. 91-1559

In The

Supreme Court of the United States

October Term, 1991

GREGORY J. AVERY and KATHLEEN R. AVERY,

Petitioners,

vs.

JEAN O. TURNER, TRUSTEE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

EMILE L. TURNER, JR.
Counsel of Record
TURNER, YOUNG, HEBBLER
& BABIN
Attorneys for Respondent
424 Gravier Street
New Orleans, Louisiana 70130
(504) 586-9120

1912
Lutz Appellate Printers, inc. • NJ (908) 257-6850 • (800) 3 APPEAL • NY (212) 840-4640 • MA (617) 542-1114
DC (202) 783-7288 • PA (215) 925-6500 • USA (800) 5 APPEAL

QUESTIONS PRESENTED FOR REVIEW

Respondent, Jean O. Turner, asserts that the question at issue in this case, to be reviewed by this Court is as follows:

> Whether or not the Chapter 7 Bankruptcy Estate of debtors has a financial interest in a terminated, but unliquidated, law partnership asset, namely contingent fee cases in which work was performed both prior to and subsequently, after the filing of their petition.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Citations ii

Statutes Involved 1

Statement of the Case 7

Summary of Argument 8

Reasons for Denying the Writ 10

Conclusion 16

TABLE OF CITATIONS

Cases Cited:

Edco Properties v. Landry, 371 So. 2d 1367 (La. App. 3 Cir. 1979), writ denied, 375 So. 2d 945 (1979) 11

In re Chris J. Roy, A Law Corporation, 130 B.R. 214 (Bkrtcy. W.D. La. 1991) 13

In re Farmer's Market, Inc., 752 F.2d 1400 (9th Cir. 1986) 10

In re Tonry, 724 F.2d 467 (5th Cir. 1984) 14

Contents

Page

Roy v. Gravel, 570 So. 2d 1175 (La. App. 3 Cir. 1990) 13

Wolf v. Whitney, 424 So. 2d 300 (La. App. 1st Cir.), writ denied, 428 So. 2d 809 (La. 1989) 12, 13

Statutes Cited:

11 U.S.C. § 365 1

11 U.S.C. § 365(c) 14

11 U.S.C. § 541 1

11 U.S.C. § 541(a) 10

11 U.S.C. § 542 ..... 1, 5

Louisiana Civil Code:

Article 2828 ..... 1, 2, 10

Article 2834 ..... 1, 3, 10

Article 2835 ..... 1, 4

Other Authority Cited:

Countryman, Executory Contracts in Bankruptcy, 57 Minn. L. Rev. 439 (1973) 15

No. 91-1559

In The

Supreme Court of the United States

October Term, 1991

GREGORY J. AVERY and KATHLEEN R. AVERY,

Petitioners,

vs.

JEAN O. TURNER, TRUSTEE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATUTES INVOLVED

In addition to the statutes set forth by petitioner, 11 U.S.C. §§ 365 and 541, this case involves Louisiana Civil Code Articles 2828, 2834, and 2835 and 11 U.S.C. § 542, set forth hereinafter:

Art. 2828. Continuation for liquidation; sole proprietorship

When a partnership terminates, the business of the partnership ends except for purposes of liquidation.

If a partnership terminates because its membership is reduced to one person, that person is not bound to liquidate the partnership and may continue the business as a sole proprietor. If the person elects to continue the business, his former partners are entitled to amounts equal to the value of their shares as of time the partnership terminated, and they have the right to demand security for the payment of partnership debts.

Acts 1980, No. 150, § 1.

Revision Comments—1980

(a) This article provides that when one of the causes of termination occurs, the business of the partnership continues, but only for purposes of liquidation.

(b) The article further provides that when there is only one remaining person, the person may elect to continue the business.

In case the business is continued, former partners may demand security for the payment of the debts of the partnership. Since the withdrawing partners have virile share liability for debts incurred prior to withdrawal, they are accordingly given

rights to demand security for the payment of those debts.

(c) If membership is reduced to one person, the former partners cannot compel liquidation if the sole ground for doing so is that the partnership has terminated because of the reduction; however, if there is some other ground for liquidation, such as the inability of the remaining person to furnish the required security, the remaining person can be forced to liquidate the business.

C.C. art. 2832 et seq.

Art. 2834. Liquidation of the partnership

In the absence of contrary agreement, a partnership is liquidated in the same manner and according to the same rules that govern the liquidation of corporations.

A partnership retains its juridical personality for the purpose of liquidation.

Acts 1980, No. 150, § 1.

Revision Comments—1980

(a) Retaining the juridical personality of the partnership facilitates the process of liquidation and insures that the fiduciary relationship between the partners and the partnership continues until final liquidation. Retaining juridical personality also allows the liquidator to act on behalf of the partnership to recover assets and permits the

creditors to institute proceedings against the partnership itself.

(b) The contract of partnership may provide for the appointment of liquidators and may set the manner and method of liquidation. For example, the partners may appoint one or more partners, one or more third persons, or a combination of partners and third persons, to serve as liquidators. This article applies only in the absence of a pertinent stipulation.

(c) Once a cause of termination occurs, the partnership is required to liquidate, unless it is continued as provided in Articles 2827 and 2828, *supra*. If the partnership does not liquidate after a cause of termination has occurred, any interested party may seek a court order directing liquidation and a judicial appointment of a liquidator. An "interested party" includes a partner, a third party creditor, an heir or assign of a partner, or any one who has a legitimate interest in the liquidation of the partnership. If the interested party has good reason for demanding liquidation, he may force liquidation even in case the partnership or the business has been continued as provided in Articles 2827 and 2828, *supra*.

R.S. 12:53, 12-141 et seq.

Art. 2835. Final liquidation

The liquidation of a partnership is not final until all its assets have been collected and applied to its obligations and its remaining assets, if any,

have been appropriately distributed to the partners.

Acts 1980, No. 150, § 1.

Revision Comments—1980

(a) This article insures that the relationship of partners to the partnership, including their fiduciary relationship, does not end fully until final liquidation has occurred. A partner's obligation to the partnership continues with regard to those matters to be carried out in the liquidation process. This is consistent with the rule that the juridical personality of the partnership continues until final liquidation; consequently there is an attendant fiduciary duty of partners not to interfere with the orderly liquidation of the partnership.

(b) This article confers power and authority on the liquidator to handle the liquidation process until the assets of the partnership have been collected, the obligations of the partnership have been satisfied, and the remaining assets, if any, have been distributed.

C.C. art. 2834.

SECTION 542 (11 U.S.C. § 542)

§ 542. Turnover of property to the estate.

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease

under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

(b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

(c) Except as provided in section 362(a)(7) of this title, an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

(d) A life insurance company may transfer property of the estate or property of the debtor to such company in good faith, with the same effect with respect to such company as if the case under this title concerning the debtor had not been commenced, if such transfer is to pay a premium or to carry out a nonforfeiture insurance option,

and is required to be made automatically, under a life insurance contract with such company that was entered into before the date of the filing of the petition and that is property of the estate.

(e) Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to to [sic] turn over or disclose such recorded information to the trustee.

STATEMENT OF THE CASE

On May 22, 1985, debtors, Gregory J. and Kathleen R. Avery, filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code. Within the schedules of bankruptcy, namely Schedule B-2, Section "u" the debtors listed a one-half (½) interest in Orrill & Avery, law partnership, which interest was valued by the debtors at zero. The duly appointed and qualified trustee commenced investigation, individually and through counsel, as to the value of the debtors' interest in the terminated law partnership, which culminated into an adversary proceeding entitled Complaint for Turnover of Value of Partnership filed on January 12, 1987. On June 5 and August 18, 1989, trial on the merits was held and a judgment was signed on January 29, 1990, by the United States Bankruptcy Court, Eastern District of Louisiana. Thereafter, a notice of appeal was filed by debtors to the United States District Court, as a court of review, which affirmed the judgment, as amended, of the Bankruptcy Court. Debtors filed a new notice of appeal to the United States Court of Appeals, Fifth Circuit, which rendered its decision on the 27th day of November, 1991, reversing the judgments of the United

States District Court and the Bankruptcy Court and remanding the case to the United States Bankruptcy Court for further hearings commensurate with its opinion. Petitions for Rehearing were filed by appellant and appellee, which were denied.

SUMMARY OF ARGUMENT

Respondent submits that the scheduled asset belonging to the bankruptcy estate, which is being requested to be turned over to the trustee for administration and distribution to the creditors, is the residuum of the partnership assets, after all debts have been paid and assets liquidated. Accordingly, your respondent contends that the fees and costs accumulated through the completion of these old partnership contingency fee cases belong to the partnership, subject to any claims by the debtor for services rendered and costs advanced subsequent to the filing of the bankruptcy proceeding. There was no executory contract between the client of the old partnership and the debtor. The contingency fee employment contracts were, at all times, between the client and the old terminated law partnership, Orrill & Avery. Partnerships, such as this law partnership, are separate and distinct legal entities. Although terminated by mutual consent of the partners, state law prescribes that a terminated (dissolved) partnership continues to exist as a juridical personality in order to liquidate its affairs. Accordingly, respondent avers that the issue of acceptance or rejection of non-assumable pre-petition executory contracts is illusionary since the old partnership contingency fee contracts were always the property of the terminated partnership, a non-debtor. In short, the debtor, Gregory J. Avery, in the exercise of his fiduciary obligation to the partnership and for his own possible future financial gain, continued to perform services on old partnership cases. All funds generated through the completion of these contingent fee cases belong to the terminated partnership, subject to a claim of offset for work performed post bankruptcy filing. Alternatively,

respondent avers that the United States Court of Appeals, Fifth Circuit, correctly ruled that although the trustee could not assume the executory contracts (contingency fee contracts), the bankruptcy estate was entitled to the value of the work performed up to the date of filing. That court stated:

> The contingent fee contracts in the case at bar were executory because Avery was required to perform services after the bankruptcy petition was filed. Because the contracts were nonassumable as a matter of law they did not form a part of the bankruptcy estate. *But it does not follow that the contingent fee contracts had no value to the law partnership as of the date Avery filed for Chapter 7 protection. To the contrary, the contracts on cases subsequently settled or successfully litigated did have a value on that date. That value is determinable on a* quantum meruit *basis by measuring the value and worth of the legal services performed both before and after the bankruptcy filing.*

(Emphasis ours.)

Although Avery chose to continue the representation of the old partnership clients, not required as stated by the court, the distinction between an individual debtor's executory contract with a client and a partnership's interest in its executory contracts is valid.

REASONS FOR DENYING THE WRIT

Without contradiction, the listing of an interest in a terminated law partnership is property of the bankruptcy estate. 11 U.S.C. § 541(a). The question of extent and value is governed by state law. *In re Farmer's Market, Inc.*, 752 F.2d 1400 (9th Cir. 1986).

What happens when a partnership, such as here, is terminated by consensual agreement of the partners?

Article 2828 of the Louisiana Civil Code states:

> When a partnership terminates, the business of the partnership ends except for purposes of liquidation.
>
> If a partnership terminates because its membership is reduced to one person, that person is not bound to liquidate the partnership and may continue the business as a sole proprietor. If the person elects to continue the business, his former partners are entitled to amounts equal to the value of their shares as of time the partnership terminated, and they have the right to demand security for the payment of partnership debts.

The purposes of liquidation are further defined in Article 2834 of the Louisiana Civil Code, to-wit:

> In the absence of contrary agreement, a partnership is liquidated in the same manner and according to the same rules that govern the liquidation of corporations.
>
> A partnership retains its juridical personality

for the purpose of liquidation.

The concept of juridical personality of a terminated partnership is not new. Even prior to the effective date of the changes to the partnership articles, Title XI Partnerships, Louisiana Civil Code, effective January 1, 1981, the jurisprudence had established the limbo status of the terminated partnership. In the case of *Edco Properties v. Landry,* 371 So. 2d 1367 (La. App. 3rd Cir. 1979), *writ denied,* 375 So. 2d 945 (1979), a thorough analysis of this principle was discussed. It stated at 1371:

> The Louisiana partnership has long been considered a juridical person for certain purposes. It is possessed of rights and privileges and it is subject to obligations distinct from those of the individuals composing it. The partnership itself may own property, and it stands as the creditor or debtor of its own rights and obligations. *Blanchard v. Cole,* 8 La. 153 (1835); *Dick v. Byrne,* 7 Rob. 465 (1844); *Succession of Pilcher,* 39 La. Ann. 362, 1 So. 929 (1887).
>
> * * *
>
> A partnership may institute suit in its own name to assert its interests in its property, such being a corollary of the well settled rule that both movable and immovable partnership property is owned by the firm itself and not by the individual partners. *Succession of Pilcher,* supra; *Toelke v. Toelke,* 153 La. 697, 96 So. 536 (1923); *Posner v. Little Pine Lumber Co.,* 157 La. 73, 102 So. 16 (La. 1924); *Wolf v. New Orleans Tailor-Made Pants Co.,* 52 La. Ann. 1357, 27 So. 893 (1900); *E.B. Hayes Machinery Co. v. Eastham,* 147 La.

347, 84 So. 898 (1920); *Snyder v. Davidson,* 172 La. 274, 134 So. 89 (1931). The right of the individual partners to property standing in the name of the partnership is no more than a right to an undivided interest in whatever property remains after the partnership is dissolved, its rights and obligations are satisfied, and its unliquidated assets liquidated. In *Posner,* supra, the court stated:

> "On the legal proposition that the debts must be paid before the partners can divide the property, that the assets belong to no partner separately, but are a common stock pledged for the debts of the partnership, see *Ward v. Brandt,* 11 Mart. (O.S.) 331, 13 Am. Dec. 352; *United States v. Baulos,* 5 Mart. (N.S.) 567; *Purdy v. Hood,* 5 Mart. (N.S.) 626; *Claiborne v. Their Creditors,* 18 La. 501; *Mourain v. Delamarre,* 2 La. Ann. 142.
>
> We quote the following from the *Succession of Pilcher,* 39 La.Ann. 362, 1 So. 929.
>
> 'A partnership once formed and put into action becomes, in contemplation of law, a moral being, distinct from the persons who compose it. . . . The partners are not the owners of partnership property. It belongs to the ideal being which has the control and administration thereof to enable it to fulfill its legal duties and obligations. The partners own the residuum.' "

See also, Wolf v. Whitney, 424 So. 2d 300 (La. App. 1st

Cir.), *writ denied,* 428 So. 2d 809 (La. 1989).

Although the debtor, Gregory J. Avery, became an owner in division at the moment of termination, his ownership was only to the residuum of the partnership assets after all debts had been paid and all existing assets (contracts) had been liquidated. Accordingly, since the ex-partners have a fiduciary obligation to the terminated partnership and deemed it beneficial to the partnership clients as well as themselves to liquidate the partnership assets in a program devised by themselves, the funds generated or to be generated from the contractual performance of contracts belonging to the terminated partnership are nevertheless partnership property.[1]

At the moment of consensual termination, this law partnership had contingent fee contracts which it owned. The work performed, prior to termination, was in various stages of completion. The ex-partners, Orrill & Avery, voluntarily maintained these partnership contracts to completion, under a private settlement agreement amongst themselves. These partnership contracts did not evolve into individual professional contracts merely because of the termination of the partnership. In the case of *Roy v. Gravel,* 570 So. 2d 1175 (La. App. 3 Cir. 1990), that court held:

> Exceptors' conclusions are based on a false premise, and that is that the partnership terminated for all purposes on January 19, 1980. As we observed earlier in this opinion, citing and quoting from *Edco Properties v. Landry,* 371 So. 2d 1367, 1373-1374 (La. App. 3rd Cir. 1979), a dissolved partnership maintains a fictional existence until all

---

1. *In re Chris J. Roy, A Law Corporation,* 130 B.R. 214 (Bkrtcy. W.D. La. 1991).

> of its affairs are wound up and completed. Accordingly, with respect to every imcomplete case file, which is what this litigation is all about, the partnership GRB is still very much in existence. Nor is it correct to analogize the termination of a partnership to the death of an individul partner. No attorney has died, and the partnership has not died. A partnership retains its juridical personality or "life" for purposes of liquidation.
>
> * * *
>
> The business of GRB was the delivery of legal services. Its contractual relations with its clients did not end or terminate upon termination of the partnership.
>
> * * *
>
> The performance of a contingent fee contract with a client is a business transaction. The contingent fee contracts pending at the time of termination continued to be partnership business after dissolution. These contracts were not, as contended by exceptors, dissolved. This kind of injustice resulting to clients of dissolving partnerships is unthinkable.

The matter, *In re Tonry*, 724 F.2d 467 (5th Cir. 1984), is the cornerstone of this writ. Since a trustee is prohibited from assuming executory contracts which a non-debtor may terminate under applicable state law[2], our able opponent forcefully asserts that the contingent fee cases of the terminated partnership handled

---

2. 11 U.S.C. § 365(c).

to completion by the debtor are nonassumable. Alternatively, proponents of this writ argue that the private settlement agreement is an executory contract between the terminated partnership and himself.

First off, the substantive law of the State of Louisiana regarding partnerships, its termination and final liquidation, clearly sets forth that the terminated partnership continues to maintain ownership of its contracts. Accordingly, *vis a vis,* client and partnership contracts, a trustee of a debtor, ex-partner, has not the right or ability to assume, even if permissible, a third party contract of non-debtors. Secondarily, there was no contract between the terminated partnership and the debtor relative to the continued handling of these contingent fee contracts. Because of the debtor's relationship with the terminated partnership, unbeknownst to the partnership client, a private "deal" was confected between the ex-partners for the continued representation of old partnership cases. This subsidiary agreement does not qualify as an executory contract since the non-debtor, ex-partner, has no obligation to perform any services whatsoever on cases assigned to debtor except to receive a portion of the fee and costs collected from the completed services, on behalf of the old partnership client, by the debtor.

Reviewing the definition of executory contracts as expressed by Professor Countryman, he states "an executory contract is one under which the obligation of both the bankrupt and the other party to a contract are so far unperformed that failure of either to complete performance would constitute a material breach excusing the performance of the other." Countryman, *Executory Contracts in Bankruptcy*, 57 Minn. L. Rev. 439, 460 (1973).

Revisiting the facts of this case, the debtor and his ex-law partner agreed amongst themselves to continue to provide legal representation to those contingent fee contracts assigned to them

on the date of termination. This agreement called for each attorney to provide services and advance costs for which he would receive forty-five percent of the recoverable attorney's fees and costs. However, the other ex-partner attorney has no responsibility for providing services or advancement of funds. The contingent fee cases were completely controlled, managed and completed by the attorney (debtor) assigned from the master list of files. Accordingly, the non-debtor law partner had no responsibilities for performance, only the right to participate in the collection of attorney fees and costs therefrom.

As a last bastion of defense, the equitable solution fashioned by the Court of Appeals, Fifth Circuit, is correct in that the contingent fee contracts had value to the terminated partnership. Even though respondent disagrees with the underlying conclusion relative to the contingent fee contracts belonging to the debtor, the claim of the trustee for the value of debtors' interest in the terminated partnership at the time of filing is separate and distinct. This is especially true of fees and costs received by the debtor on old partnership cases which were exclusively handled by the non-debtor ex-partner. *Quantum meruit* division of attorney fees renders the opportunity for all claimants to present their assessment of work performed, skills employed and the results received.

CONCLUSION

This writ of certiorari filed by petitioners should be denied for the following reasons:

a) The contingency fee contracts owned by the terminated law partnership remained the property of the terminated partnership.

b) The contingency fee contracts of the terminated partnership remained the property of the terminated partnership

until fully liquidated.

c) The contingency fee contracts of the terminated partnership had value as of the time of termination and as of the time of the filing of the petition for relief in bankruptcy, Chapter 7 liquidation, by the debtors, Gregory J. and Kathleen R. Avery.

d) The interest of the debtor in the terminated partnership became property of the bankruptcy estate as of the moment of filing.

e) The value of the debtor's interest in the terminated partnership is the full amount of the assets minus the debts, known as the residuum, to which this debtor would have been entitled to fifty percent.

f) At the moment of filing, the bankruptcy estate became owner of that residuum of the debtor, Gregory J. Avery, subject to any offsetting claims of the debtor in connection with the completion of the contracts under the theory of *quantum meruit*.

g) The trustee of the bankruptcy estate had no executory contract to accept or reject, even if it were assumable, since the executory contract was between two non-debtors, *i.e.* the client and the old terminated partnership.

Respectully submitted,

EMILE L. TURNER, JR.
Counsel of Record
TURNER, YOUNG, HEBBLER & BABIN
Attorneys for Respondent

(3)

91-1559

Supreme Court, U.S.
FILED
MAY 22 1992
OFFICE OF THE CLERK

No. 91-1159

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GREGORY J. AVERY AND KATHLEEN R. AVERY,
Petitioners,

versus

JEAN O. TURNER, TRUSTEE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITIONERS' REPLY BRIEF

R. PATRICK VANCE *
PIERRE V. MILLER II
JONES, WALKER, WAECHTER,
POITEVENT, CARRERE & DENEGRE
201 ST. CHARLES AVE.
NEW ORLEANS, LA. 70170
TELEPHONE: (504) 582-8000
ATTORNEYS FOR PETITIONERS
* Counsel of Record

TABLE OF CONTENTS

Table of Authorities ii

Reasons for Granting the Petition 2

I. The Parties Do not Dispute the Existence of a Split among the Circuits and the Importance of the Federal Question Presented 2

II. The Existence of a State Law Issue Has no Bearing on Whether to Grant This Petition 3

A. Debtors' Contention Regarding the State Law Issue 5

B. Respondent's Contention Regarding the State Law Issue 6

Conclusion 8

TABLE OF AUTHORITIES

FEDERAL CASES

Ford, Bacon & Davis, Inc. v. Holahan, 311 F.2d 901 (5th Cir.), *cert. denied* 373 U.S. 913 (1963) 2

In re Calder, 912 F.2d 454 (10th Cir. 1990) 3

In re Farmers Markets, Inc., 792 F.2d 1400 (9th Cir. 1986) 5

In re Gravure Paper & Board Corp., 234 F.2d 928 (3rd Cir. 1956) 2

In re Lovitt, 757 F.2d 1035 (9th Cir.), *cert. denied sub nom. Cheadle v. Appleatchee Writer's Association*, 474 U.S. 849 (1985) 2

In re Moreggia & Sons, Inc., 852 F.2d 1179 (9th Cir. 1988) 2

In re Tleel, 876 F.2d 769 (9th Cir. 1989) 2

In re Tonry, 724 F.2d 467 (5th Cir. 1984) 5

NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984) 6

Turner v. Avery, 947 F.2d 772 (5th Cir. 1991) 3, 5

STATUTES

11 U.S.C. § 542 4

LA. CIV. CODE ANN. art. 2828 (West Supp. 1992) ... 6

LA. CIV. CODE ANN. art. 2834 (West Supp. 1992) ... 6

No. 91-1159

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GREGORY J. AVERY AND KATHLEEN R. AVERY,
Petitioners,

versus

JEAN O. TURNER, TRUSTEE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITIONERS' REPLY BRIEF

Gregory J. and Kathleen R. Avery ("Debtors") respectfully submit this reply to respondent's opposition to Debtors' Petition for Writ of Certiorari ("Petition") to the United States Court of Appeals for the Fifth Circuit.

REASONS FOR GRANTING THE PETITION

I. THE PARTIES DO NOT DISPUTE THE EXISTENCE OF A SPLIT AMONG THE CIRCUITS AND THE IMPORTANCE OF THE FEDERAL QUESTION PRESENTED.

Debtors have petitioned this Court for a writ of certiorari to the Fifth Circuit to review the following question of federal law:

> Whether, in a Chapter 7 bankruptcy liquidation, post-petition payments for the debtor's services rendered both before and after the filing date pursuant to a rejected or a nonassumable pre-petition executory contract belong to the estate, the debtor, or both under the Bankruptcy Code, 11 U.S.C. § 541 and § 365.

In opposition, respondent does **not** dispute that the United States Circuit Courts of Appeals are divided on the question presented. *Cf. In re Tleel*, 876 F.2d 769, 770 (9th Cir. 1989); *In re Lovitt*, 757 F.2d 1035, 1041 (9th Cir.), *cert. denied sub nom. Cheadle v. Appleatchee Rider's Association*, 474 U.S. 849 (1985); *In re Moreggia & Sons, Inc.*, 852 F.2d 1179, 1185 (9th Cir. 1988); *In re Gravure Paper & Board Corp.*, 234 F.2d 928, 930 and 932 (3rd Cir. 1956); and *Ford, Bacon & Davis, Inc. v. Holahan*, 311 F.2d

901, 902 (5th Cir.), *cert. denied* 373 U.S. 913 (1963) with *Turner v. Avery*, 947 F.2d 772, 774 (5th Cir. 1991) and *In re Calder*, 912 F.2d 454 (10th Cir. 1990). Furthermore, respondent does **not** dispute the importance of resolving the split of authority on this federal question of law.

II. THE EXISTENCE OF A STATE LAW ISSUE HAS NO BEARING ON WHETHER TO GRANT THIS PETITION.

Instead, respondent turns to the merits of the case, arguing the post-petition payments Debtors received were not made pursuant to an executory contract. Respondent challenges whether this Court would reach the question presented if it grants Debtors' Petition. Respondent's challenge is lacking.

Effective May 1, 1985, petitioner Gregory J. Avery and Ray Orrill, both attorneys, mutually terminated their law partnership before Debtors filed for bankruptcy on May 22, 1985. The trial court found the partners agreed to complete the partnership's contingent fee contracts as follows:

> After the termination of the partnership, each attorney with primary responsibility for a case was to continue to manage the case to conclusion and all expenses were to be

> funded by the attorney assigned the case. . . . Upon completion of a partnership case, the parties agreed that. . . [t]en percent of the fee would be placed in the partnership account to pay for partnership debts and any costs advanced by the partnership. . . . Costs advanced by the attorney would be paid directly to the attorney; the balance of the fee would be split evenly.

Findings of Fact and Conclusions of Law, Appendix C.1 to Petition for Writ of Certiorari, pp. 19-20, ¶ 4.

Debtors received post-petition payments pursuant to this "private settlement agreement."[1] Respondent initiated an adversary proceeding under 11 U.S.C. § 542 against Debtors, claiming as property of the bankruptcy estate **all** attorney's fees Debtors earned and received from the former partnership's contingent fee contracts after filing their bankruptcy petition.

Issues of the existence and scope of a debtor's interest in a given asset are resolved by reference to state

---

[1]Debtors adopt this term respondent used to describe the former partners' agreement governing completion of their contingent fee contracts and distribution of the resultant fees. Respondent's Brief in Opposition, p. 13.

law. *In re Farmers Markets, Inc.*, 792 F.2d 1400, 1402 (9th Cir. 1986). The parties dispute the effect of the partnership's termination on ownership of the former partnership's contingent fee contracts under Louisiana state law. As a result, the parties disagree over the identity of the "given asset" pursuant to which Debtors received post-petition payments.

The existence of this dispute is irrelevant to this Court's decision of whether to grant Debtors' Petition because resolution of this issue will have no bearing on whether this Court will reach the question presented. No matter how this issue is resolved, the "given asset" entitling Debtors to receive post-petition payments is a nonassumable or rejected executory contract.

A. Debtors' Contention Regarding the State Law Issue.

Debtors contend that upon dissolution, the partnership ceased to exist as a separate entity and could no longer own assets. The former partners each became owners of undivided interests in the contingent fee contracts. Accordingly, the fees Debtors received were for services rendered pursuant to these contingent fee contracts. Such contracts are nonassumable executory contracts. *In re Tonry*, 724 F.2d 467, 468-69 (5th Cir. 1964); *Turner v. Avery*, 947 F.2d 772, 774 (5th Cir. 1991).

Debtors ask this Court to resolve the question presented in terms of whether the post-petition payments Debtors received for services rendered pursuant to these nonassumable pre-petition executory contingent fee contracts belong in the bankruptcy estate.

B. Respondent's Contention Regarding the State Law Issue.

A Louisiana partnership may maintain a *fictional* existence for the purpose of liquidation. LA. CIV. CODE ANN. art. 2828 and 2834 (West Supp. 1992). Respondent contends the partnership continued to exist and own assets, including the contingent fee contracts, after termination. According to respondent, each partner owned an interest in the terminated *partnership*, not in the contracts, when Debtors filed for bankruptcy. Respondent concedes Debtors received post-petition payments pursuant to a private settlement agreement governing liquidation of the contingent fee contracts, but erroneously contends this agreement was not executory.

An executory contract is one "on which performance remains due to some extent on both sides." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522 n.6 (1984). As noted above, the trial court found each former partner bound himself to render the legal services and advance the expenses necessary to complete those case for which the

partner had primary responsibility. In return, each partner would receive forty-five percent of all fees earned. On the filing date performance remained due to some extent on both sides, *i.e.*, both partners had obligations to each other and to their clients to perform legal services and fund expenses[2]; therefore, the private settlement agreement, like the contingent fee contracts, was executory.

Assuming under state law the terminated partnership continued to own the contingent fee contracts, this Court would address the question presented in terms of whether any of the post-petition payments Debtors received for services rendered pursuant to a nonassumable pre-petition executory private settlement agreement belong in the bankruptcy estate. Thus, this Court will reach the question presented even assuming the correctness of respondent's position on the state law issue.

---

[2]Respondent first concedes the partnership liquidation agreement "called for each attorney to provide service and advance costs for which he would receive forty-five percent of the recoverable attorney's fees and costs," but then argues "the non-debtor law partner had no responsibility for performance, only the right to participate in the collection of attorney fees and costs therefrom." Respondent's Brief in Opposition, p. 16. Respondent fails to recognize that the non-debtor partner was obligated to complete the cases for which he had primary responsibility and to split the fees he recovered, in return for which he shared in the fees recovered on the cases handled and funded by the debtor attorney.

CONCLUSION

The existence of the dispute over the proper application of state partnership law should have no bearing on this Court's decision of whether to grant Debtors' Petition because it will not affect this Court's analysis of the question presented. Both the contingent fee contracts and the private settlement agreement were executory. Whether this Court rules Debtors' received the payments for services rendered pursuant to the contingent fee contracts or the private settlement agreement, the Court will reach the question whether post-petition payments for the Debtors' services rendered *pursuant to a rejected or nonassumable pre-petition executory contract* belong in the bankruptcy estate.

Respondent does not deny the importance of the question presented. Also, respondent does not deny the split of authority regarding this federal question among the United States Circuit Courts of Appeals. This split has and will cause inconsistent application of the Bankruptcy Code to executory contracts. Furthermore, the law adopted by the Fifth and Tenth Circuits frustrates Congress' policies of promoting speedy and inexpensive administration and settlement of bankruptcy estates and of securing for the debtor a fresh start. Accordingly, this

Court should grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to resolve the question presented.

Respectfully submitted,

R. PATRICK VANCE *
PIERRE V. MILLER II
Jones, Walker, Waechter, Poitevent, Carrere & Denegre
201 St. Charles Avenue, 49th Floor
New Orleans, La. 70170
Telephone: (504) 582-8000

* Counsel of Record